

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

RECEIVED
JAN 11 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Idaho Public Utilities Commission)
Petition for Rulemaking Pursuant to)
Section 251(h)(2) of the Communications Act)
)

CC Docket No. 98-221

AMERITECH COMMENTS

I. INTRODUCTION

The Ameritech Operating Companies (Ameritech) respectfully submit the following comments in support of the above-captioned Petition for Rulemaking filed by the Idaho Public Utilities Commission (Idaho).¹ In its petition, Idaho asks the Commission to rule that CTC Telecom, Inc. (CTC), a so-called competitive local exchange carrier (CLEC), which will be the sole provider of facilities-based telephone exchange service in a new planned community called Hidden Springs Development (Hidden Springs), should be treated as an incumbent local exchange carrier (incumbent LEC or ILEC) pursuant to section 251(h)(2) of the Communications Act. Idaho asks further that the Commission adopt a rule extending this holding to any similarly situated local exchange carrier.

¹ Idaho filed its petition as a request for declaratory ruling. By Public Notice issued December 8, 1998, the Commission stated that it would treat Idaho's request as a petition for rulemaking. See *Pleading Cycle Established for Comments on Idaho Public Utilities Commission Petition for Rulemaking Pursuant to Section 251(h)(2) of the Communications Act*, DA 98-2510, released Dec. 8, 1998.

No. of Copies rec'd _____
List ABCDE _____

0+4

As discussed below, Ameritech supports the Idaho request. Under section 251(h)(2) of the Communications Act, as amended, (the Act) the Commission may treat any carrier, including a CLEC, as if it were an ILEC, for purposes of section 251 of the Act if that carrier is comparable to and has supplanted an ILEC within an area, and if such treatment is in the public interest. This test is clearly met by CTC, which enjoys exclusive ownership and control over the only loops serving a new community. In order to ensure that the residents of that community have “the same opportunity as the rest of the Nation to benefit from the pro-competitive, market-opening effects of the Telecommunications Act of 1996[.]”² the Commission should treat CTC as an ILEC pursuant to section 251(h)(2).

The Commission has previously ruled that the Guam Telephone Authority (GTA) should be treated as an ILEC because it was the sole provider of telephone exchange service on the island of Guam.³ Here, CTC is the sole facilities-based provider of telephone exchange service in the community of Hidden Springs. Because it owns and controls the only loops serving customers in that community, it stands in the shoes of an ILEC, no less so than did GTA. In the *Guam Order*, the Commission declined to expand its ruling beyond GTA because the record did not indicate that any similarly situated LEC exists. That consideration is not presented here. To the contrary, as new buildings and

² See *Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, 13 FCC Rcd 13765 (1998) at para. 1 (*Guam Order*).

³ *Id.*

communities are constructed throughout the country, the issue raised by CTC's provision of service in Hidden Springs will surface again and again. There is no need for duplicative litigation. Whether it is an island, a community, or simply a building, the principle is the same: the first carrier to deploy facilities to that area has all the attributes of an incumbent LEC, and unless it is treated as such, consumers will thereafter be captive customers. The Commission should rule that any LEC that if it owns the only loops that have been deployed to a new community or structure will be treated as an ILEC under section 251(h)(2). These matters are discussed in more detail below.

II. ARGUMENT

Under section 251(h)(2) of the Communications Act, as amended, the Commission may, by rule, provide for the treatment of a carrier (or a class or category of carriers) as an ILEC if three conditions are met: (i) the carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by an ILEC; (ii) such carrier has substantially replace an ILEC; and (iii) such treatment is consistent with the public interest, convenience, and necessity.⁴ Each of these conditions is met when a CLEC, such as CTC, owns the only loop(s) serving a particular building or community.

⁴ See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) at paras. 1247-48; 47 CFR § 51.223.

A. CTC Occupies a Position in the Market for Telephone Exchange Services in the Hidden Springs Development that is Comparable to the Position Occupied by an ILEC.

In its petition, Idaho argues that CTC occupies a position in the Hidden Springs Development that is comparable to that of an ILEC. Ameritech agrees.

In the *Guam Order*, the Commission found GTA to be “comparable” to an ILEC based on its conclusion that GTA occupies a dominant position in the market for telephone exchange service in Guam, coupled with economies of density, connectivity and scale that make new entry difficult, if not impossible, absent compliance with section 251(c)⁵. CTC possesses each of these attributes in Hidden Springs.

CTC has obtained exclusive rights to provide local exchange and exchange access service in a new planned community currently under construction. As the *exclusive* provider of services to Hidden Springs, CTC will not merely be dominant in that area; it will be the monopoly provider in that area.

It will also enjoy economies of density, connectivity, and scale. The most obvious source of these economies is its exclusive contract to provide telephone exchange and other services to all consumers in Hidden Springs. That, however, is not its only advantage. Unlike other LECs that may seek to compete for business in Hidden Springs in the future, CTC will be able to deploy loops and other local exchange facilities in the most efficient way possible -- as part of an

⁵ *Guam Public Utilities Commission, Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h) of the Communications Act, Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(20) of the Communications Act*, Notice of Proposed Rulemaking, 12 FCC Rcd 6925 (1997) at para. 26 (*Guam Notice*).

overall construction plan coordinated by the developer. It will not have to rip up streets or tear down walls: CTC's infrastructure will be put into place before the streets are paved and the walls are built.

These economies are unavailable to other carriers that might seek to provide a competing wireline service. As Idaho notes, if CTC is permitted to escape section 251(c), any customer desiring a different carrier "would be faced with the 'non-choice' of requiring [that carrier] to overbuild in order to provide service. For example, any new CLEC must build its own facilities, dig up existing streets, and lay wire. Obviously, no customer would be willing to pay for that over built facility."⁶ Under these circumstances, CTC occupies a position in the Hidden Springs area that is comparable to that of an ILEC.

B. CTC Has Substantially Replaced an ILEC in Hidden Springs

Idaho argues, further, that CTC has substantially replaced the incumbent LEC, US West, in the Hidden Springs Development. Again, Ameritech agrees.

In the *Guam Notice*, the Commission stated that "the word replace can mean 'to take the place of: serve as a substitute for or successor of: SUCCEED, SUPPLANT....'"⁷ The Commission noted that GTA had not supplanted an incumbent LEC in Guam because none existed. Nevertheless, it tentatively concluded, and later found, that GTA had satisfied this prong of the section 251(h)(2) test. It found that this test should be deemed satisfied where "the LEC

⁶ Idaho Petition at 8.

⁷ *Guam Notice* at para. 28.

at issue provides local exchange service to all or virtually all of the subscribers in an area that did not receive telephone exchange service from a NECA member as of the date of enactment of the 1996 Act.”⁸

Clearly, this test is satisfied by CTC. CTC will provide local exchange service to all of the subscribers in the Hidden Springs Development. Moreover, since it is the first provider of telephone exchange service in that area, none of those subscribers previously received service from a NECA member. Thus, CTC has “replaced” an incumbent LEC in Hidden Springs.

C. Treatment of CTC as an Incumbent LEC is Consistent With the Public Interest, Convenience, and Necessity.

Idaho argues, thirdly, that treating CTC as an incumbent LEC would be consistent with the public interest, convenience, and necessity. Here, again, it is correct.

As Idaho notes, “treating CTC as an incumbent LEC may well be a prerequisite for the development of competition in [Hidden Springs].”⁹ This is the very consideration that led the Commission to conclude that treating GTA as an incumbent LEC would be consistent with the public interest, convenience, and necessity.¹⁰ It is as compelling in the context of Hidden Springs as in Guam. Indeed, the situation in Hidden Springs is a microcosm of that presented in Guam. Hidden Springs is smaller and less geographically distinct than the island

⁸ *Id.* at para. 31.

⁹ Idaho Petition at 10.

¹⁰ See *Guam NPRM* at paras. 40-42.

of Guam, but, like Guam, it will be served by a LEC with exclusive access to all customers and exclusive ownership and control over all loop facilities that are available to serve those customers. Just as treating GTA as an incumbent LEC was in the public interest, so too is treating CTC as an ILEC.

Indeed, there may be even stronger public policy reasons to treat CTC as an incumbent LEC. Unlike GTA's status in Guam, which, as the Commission noted, was unique, new buildings and communities are not, nor are exclusive contracts to provide facilities and services to new communities and structures. As the numbers of new buildings and communities multiply, so too would the number of consumers to whom the pro-competitive benefits of the 1996 Act would be denied. The Commission should not sanction these monopoly pockets. The public interest requires that it treat CTC as an incumbent LEC under section 251(h)(2).

D. The Commission Should Also Treat All Similarly Situated Carriers As Incumbent LECs.

Merely treating CTC as an incumbent LEC, however, is not enough. New buildings or developments are constructed every day. If the carrier that is "first-in" is permitted to escape regulation as an incumbent LEC, that carrier is effectively assured indefinite monopoly control over telephone service to that building or community. Such a situation would fly in the face of the market-opening initiatives of the 1996 Act. Whether it is a community, like Hidden Springs, a cluster of townhouses, or any other new construction, the issue is the same: the carrier that lays the first facilities – in particular, the loops - will have

insuperable advantages over any other carriers that subsequently seek to provide service in that area, unless the first carrier is subject to the requirements of section 251(c).

The Commission does not have the resources to address each community or structure on a case-by-case basis. It certainly cannot do so on a timely basis, particularly since each decision must be made by "rule," which means it must be preceded by a Notice of Proposed Rulemaking. To ensure that the benefits of local exchange competition are – and continue to be – available to all Americans, the Commission should short-circuit the need for case-by-case litigation by ruling that any LEC shall be treated as an ILEC if it owns the only loops that have been deployed to a new community or structure. In those rare cases, if any, in which an exception to this rule may be appropriate, the Commission can issue an appropriate waiver.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Gary L. Phillips".

Gary L. Phillips
Counsel for Ameritech
1401 H Street, N.W. #1020
Washington, D.C. 20005
(202) 326-3817

January 11, 1999

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of Ameritech Comments has been served on the party below via UPS next-day mail, on this 11th day of January 1999.

By: 
Anisa A. Latif

Cheri C. Copsey
Deputy Attorney General
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702-5983